Supreme Court, U.S.
FILED
AUG 26 1993
OFFICE OF THE CLERK

93-777

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

GEORGE CHAPDELAINE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GEORGE CHAPDELAINE
REG. NO. 02721-070
P.O. BOX 1000
LEWISBURG, PA 17837

Assisted by:

Donald E. Johnson, Paralegal
P.O. Box 1000
Lewisburg, PA 17837

QUESTION PRESENTED

DOES A TRIAL BECOME INHERENTLY UNFAIR WHEN A DEFENDANT IS FOUND GUILTY BY A JURY VERDICT FOR AN OFFENSE NOT INCLUDED OR SET FORTH IN THE INDICTMENT?

TABLE OF CONTENTS

QUESTION PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... iii

OPINIONS BELOW..... iv

JURISDICTION..... iv

CONSTITUTIONAL PROVISIONS..... iv

STATEMENT OF THE CASE..... 1

REASONS FOR GRANTING WRIT..... 6

CONCLUSION..... 11

INDEX TO APPENDIX

Opinion of the First Circuit Court of Appeals..... 1a

Court of Appeals Denial of Petition for Rehearing..... 33a

U.S. Const. amend. V 35a

U.S. Const. amend. VI..... 36a

TABLE OF AUTHORITIES

CITATION: PAGE

BIHN v. UNITED STATES
328 U.S. 633, 66 S.Ct. 1172.. 6

CHOW BING KEW v. UNITED STATES
248 F.2d 466 (9th Cir.) cert. denied, 355 U.S. 889 (1957).. 9

SMITH v. PHILLIPS
455 U.S. 209 (1982)..... 8

TURNER v. LOUISIANA
379 U.S. 466 (1965)..... 8

UNITED STATES v. DELANEY
732 F.2d 639 (8th Cir 1984).. 7

STATUTES INVOLVED:

18 U.S.C. § 922(g)(1)..... 3
18 U.S.C. § 922(i)..... 3
18 U.S.C. § 922(k)..... 3
18 U.S.C. § 924(c)(1)..... 2
18 U.S.C. § 1951..... 2
18 U.S.C. § 2113..... 2
18 U.S.C. § 2312..... 2
28 U.S.C. § 1254(1).....iv

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V 35a
AMENDMENT VI 36a

OPINIONS OF THE COURT BELOW

The opinion of the court of Appeals is reported as U.S. v. Chapdelaine, 989 F.2d 28 (1st Cir. 1993) and appears in the Appendix herewith at 1a.

JURISDICTION

The First Circuit Court of Appeals' Opinion in this matter was filed on April 4, 1993. The Court of Appeals' denial of Petition for Rehearing was issued on May 4, 1993, and is set forth at Appendix 33a.

This Court's juridiction is invoked under Title 28 U.S.C. § 1254(10.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendments V and VI to the United States Constitution is set forth in full at Appendix 35 and 36 respectively.

No._____

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

OCTOBER TERM, 1992

GEORGE CHAPDELAINE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Petitioner, George Chapdelaine, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the First Circuit entered in this case on March 5, 1993.

STATEMENT OF THE CASE

The decision of the Court of Appeals for the First Circuit which the petitioner asks this Court to review involves the question as to whether the Court of Appeals erred in finding that the petitioner suffered no prejudice as a result of the jury returning a verdict of guilty to a charge that was not included in the superseding indictment.

The following represents a brief conspectus of the case as it relates to the issue presented herein:

On April 3, 1991, a federal Grand Jury in the District of Rhode Island returned a fourteen-count indictment against petitioner and three codefendants. Thereafter, on May 8, 1991, the grand Jury returned an eighteen-count superseding indictment. The superseding

indictment charged in pertinent part the following: Count One; Conspiracy to rob and to attempt to rob a federally insured bank; to use dangerous weapons while committing or attempting to commit the bank robbery; to transport stolen vehicles in interstate commerce; and, being convicted felons in possession of firearms and ammunition. Count-Two charged petitioner, et al., with a Hobbs Act Conspiracy, 18 U.S.C. § 1951. Count Three charged petitioner, et al., with attempt to rob a federally-insured bank, 18 U.S.C. § 2113(a) and 2. Count-Five charged petitioner, et al., with using and carrying firearms during and in relation to a crime of violence, 18 U.S.C. § 924(c)(1). Count-Six through Count-Eleven charged petitioner, et al., with interstate transportation of a stolen vehicle, 18 U.S.C. § 2312 and

2. Counts Twelve through Fifteen charged petitioner, et al., with felons in possession of firearms, 18 U.S.C. § 922(g)(1). Count Sixteen charged petitioner, et al., with interstate transportation of a firearm with an obliterated serial number in violation of 18 U.S.C. § 922(k) and 2. Count Seventeen charged only a codefendant (not petitioner) with interstate transportation of a stolen firearm, 18 U.S.C. § 922(i) and 2. Count Eighteen charged petitioner alone with being a felon in possession of ammunition, 18 U.S.C. § 922(g)(1).

On August 27, 1991, pursuant to the Government's motion, Counts Six and Seven were dismissed. The trial began on December 5, 1991, and concluded on December 12, 1991 with the jury returning verdicts of guilty on Counts One through

Five, Counts Nine, Eleven, Thirteen, Sixteen, Seventeen and Eighteen, not guilty on Counts Eight and Ten.

On March 10, 1992, petitioner appeared before Senior Judge Raymond J. Pettine, for sentencing. The Government moved to dis miss petitioner's conviction on Count Seventeen. The Judge agreed that because petitioner had not been named in Count Seventeen (interstate transportation of a stolen firearm), the conviction on that count was invalid.

On March 18, 1992, the district court imposed a sentence of imprisonment upon petitioner totaling 138 months. A timely notice of appeal was filed.

Petitioner argued before the Court of Appeals for the First Circuit that, inter alia, the jury was improperly influenced by the evidence submitted in support of count-seventeen (the count

for which the petitioner was not indicted, yet was found guilty of by the jury).

Petitioner further argued that as a result of this plain error, his right to due process and a fair trial as guaranteed by the Fifth and Sixth Amendments were violated.

The Court of Appeals found that this specific claim is most serious, however, the Court said, "[w]e are not cited to any precedent directly addressing this issue." United States v. Chapdelaine, 989 F.2d 28, 34 (1st Cir. 1993).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the following:

First, the Court of Appeals for the First Circuit rendered a decision in the case sub judice which is in direct contravention to a prior decision of this court. In Bihn v. United States, 328 U.S. 633, 66 S.Ct. 1172 (1946), it was held by this Court that:

> ". . . [W]hile there was sufficient evidence for the jury, the case againt the petitioner was open and shut. Since the scales were quite evenly balanced, we feel that the jury might have been influenced by the erroneous charge. Hence, we cannot say it was not prejudicial and hence treat it as a minor aberration of trivial consequence. Nor is it enough to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic functions

> of the jury under our system of government."

In the instant case, it cannot be assumed that the jurors were not improperly influenced by the evidence submitted to support the count for which the petitioner was convicted even though not indicted in the superseding indictment. The violation of the petitioner's right to due process and a right to a fair trial as guaranteed by the Sixth Amendment are clearly evident. The First Circuit Court of Appeals' decision in the instant case is also in direct conflict with the Eighth Circuit Court of Appeals which held in the case of United States v. Delaney, 732 F.2d 639 (8th Cir. 1984):

> "A juror who is improperly influence by evidence submitted for a charge for which the defendant was

> not indicted amounts to a verdict which is unfair as if all were improperly influenced." Id. at 643.

The Supreme Court has maintained a time-honored controlling principle dealing with the submission to and conviction by a jury of a defendant on an indictment count not related to the defendant. See Turner v. Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965). This Court held in Turner, that:

> "The requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. . . ."

Id. at 472. Moreover, this Court in Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982), has defined Due Process, in relation to trial by jury to mean "a jury capable and willing to decide the case solely on

the evidence before it", and the responsibility of the trial judge to be ever watchful to prevent prejudical occurrences and to determine the effect of such occurrences when they happen."

The gravamen of the case at bar is the jury was allowed to believe that the petitioner possessed this stolen firearm which could have easily led to an inference that the petitioner possessed the firearms listed in other counts of the superseding indictment as well.

The closest case on point to the issue at hand is Chow Bing Kew v. United States, 248 F.2d 466 (9th Cir.), cert. denied, 355 U.S. 889 (1957). In Chow Bing Kew, the Ninth Circuit dismissed a conviction on a count in which the defendant was not named while leaving intact a conviction on another charge.

However, the question of whether the former conviction invalidated the latter was apparently not raised.

This Court should grant certiorari to establish precedent which will become the benchmark from which this issue can be resolved in the case at hand, and in future cases presented on appeal, which contain this most exceptionally important question of constitutional magnitude.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

Respectfully submitted,

/s/_____

George Chapdelaine
Reg. No. 02721-070
P.O. Box 1000
Lewisburg, PA 17837

Assisted by:

Donald E. Johnson, Paralegal
P.O. Box 1000
Lewisburg, PA 17837

A P P E N D I X

APPENDIX

TABLE OF CONTENTS

Opinion of the First Circuit
Court of Appeals.....1a

First Circuit Court of Appeals'
Denial of Petition for Rehearing....33a

U.S. Const. amend. V 35a
U.S. Const. amend. VI 36a

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-1358

UNITED STATES,
Appellee,

v.

GEORGE CHAPDELAINE,
Defendant, Appellant.

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Hon. Raymond J. Pettine, Senior USDJ]

Before

Selya, Cyr and Boudin, Circuit Judges.

March 25, 1993

BOUDIN, Circuit Judge. Chapdelaine appeals following his conviction for numerous offenses arising out of the planned robbery of a Wells Fargo truck by himself and others at the Emerald Square Mall in North Attleboro, Massachusetts. The plan was frustrated when the truck left the location earlier than usual. Chapdelaine was convicted after trial while his accomplices pled. We affirm.

I. THE EVENTS

Acting on an informant's tip, federal agents and state and local police on March 3, 1991, followed Chapdelaine and Anthony Fiore to a meeting with Edward Mahan and George Whalen in Walpole, Massachusetts.[1] The next day,

1/ Several law enforcement officers who participated in surveillance of the four men testified at trial to th group's activities.

March 4, Chapdelaine, Fiore, and Mahan drove Mahan's vehicle to a parking lot in Canton, Massachusetts. When they left, Fiore was driving a Wagoneer jeep later reported stolen from the lot. The Wagoneer was taken to a garage in Walpole, outfitted with a false registration plate, and then driven by Fiore (accompanied by Chapdelaine in another car) to a parking lot in North Providence, Rhode Island, where it was left. Fiore later lodged a stolen Jaguar in a different parking lot in Warwick, Rhode Island.

On March 25, Chapdelaine and Fiore arrived in separate vehicles at the Emerald Square Mall in North Attleboro, Massachusetts. There, Fiore got into Chapdelaine's car and the two drove around the mall before leaving. A few hours later, the two men returned to

the mall in Fiore's Plymouth, this time accompanied by Mahan and Whalen. The Plymouth was parked near a BayBank branch bank located in the mall, and Fiore and Mahan watched a wells Fargo truck as it arrived at the bank and was loaded by a guard. The folowing day, March 26, Fiore returned alone to the mall, spent a short period of time, and then left without having made any purchases.

The next day, March 27, Chapdelaine and Fiore drove to a department store parking lot in Taunton, Massachusetts, where they remained in their car as the same Wells Fargo truck which served the Emerald mall BayBank arrived to serve the department store. When the truck crossed the street to a nearby bank, Chapdelaine and Fiore moved their car to a spot closer to the bank. After the truck left the bank, the two men

drove back to the Emerald Mall parking lot before going home. They returned the following day March 28, to the lot in Taunton, where they again waited in their car until the Wells Fargo truck arrived and departed.

The next morning, March 29, Chapdelaine and Fiore made another brief visit to the Emerald Mall parking lot before proceeding to a parking lot in Cumberland, Rhode Island, to drop off the stolen Jaguar. They then picked up the stolen Wagoneer, now in Fiore's garage and bearing yet another registration plate, an drove it to the Cumberland lot. Later all four men met at the Cumberland lot. There, Chapdelaine opened the trunk of his car, put on gloves, handed another pair of gloves to Whalen, and removed from the trunk a green laundry bag which was then

placed in the Wagoneer. The group then drove the stolen vehicles and Fiore's Plymouth to the Emerald Mall parking lot. As the men entered the mall lot at 1:27 p.m., they were passed by the Wells Fargo truck on its way out; the truck's normal arrival time at the mall was 2 p.m. but this was Good Friday, and several of the truck's usual stops were closed. The four men pulled into a parking garage, remained there for a few minutes, and then drove back to the staging area in Cumberland.

In Cumberland, all four were arrested. The Wagoneer, which Chapdelaine was then driving, had to be turned off with a screwdriver because the steering column was pulled back and there was no key in the ignition. A subsequent search of the vehicles turned up the green laundry bag (now in Fiore's

Plymouth) which was found to contain firearms (including a .357 Magnum with an obliterated serial number), ammunition, a make-up kit, a black wig and a washcloth. Other items seized from the vehicles included gloves, several pieces of clothing, a make-up removal kit, and a police scanner and radio guidebook. Later that day, in a search of Chapdelaine's home in Woonsocket, Rhode Island, agents found five .357-caliber bullets in his bedroom closet and $22,000 in cash under his bed.

All four men were indicted. Fiore and Mahan pled guilty prior to trial.[2] Whalen, tried together with Chapdelaine, entered a guilty plea shortly before

2/ Fiore's appeal from his sentence has been previously decided. United States v. Fiore, 983 F.2d 1 (1st Cir. 1992).

the close of the government's case. Chapdelaine was convicted of conspiracy under 18 U.S.C. § 371 to rob a federally insured bank and to commit four other, related offenses; of two Hobbs Act violations, 18 U.S.C. § 1951; of attempting to rob a federally insured bank, 18 U.S.C. § 1; of using and carrying firearms during a crime of violence, 18 U.S.C. § 924(c)(1); of transporting stolen vehicles in interstate commerce, 18 U.S.C. § 2312; and of four firearms-related offenses, 18 U.S.C. § 922.

After trial, the district court vacated the conviction on one of the firearms counts because Chapdelaine's name had been inadvertently omitted from that count in a superseding indictment used at trial. On all counts but one, Chapdelaine was sentenced to concurrent

sentences, the longest being 78 months' imprisonment; on the conviction for carrying a firearm during a crime of violence, the court imposed a five-year consecutive prison sentence made mandatory by 18 U.S.C. § 924(c). This appeal followed.

II. THE TRIAL

Publicity and Jury Prejudice. Chapdelaine first contends that the district court erred in denying his informal motion for a change of venue on grounds of prejudicial pretrial publicity. As evidence of prejudicial coverage, Chapdelaine points to articles in the Providence Journal newspaper and to local television coverage, which he says was inflammatory. Since Chapdelaine does not describe the content of the television reports, nor allege that the reports were seen by any of the jurors,

we have no basis for evaluating his complaint about televised coverage.

As for the newspaper articles, they are largely factual accounts of the arrests of the four men and subsequent guilty pleas of Fiore and Mahan.[3] On the day trial began, the district judge questioned each of the jurors and alternates, who had been empaneled two months before, to determine whether they had discussed the case, been approached or read or heard anything about it. Only four of the panel, two of whom ultimately deliberated, answered in the affirmative; each had been exposed to a November 20, 1991 Providence Journal article

3/ One of the articles mentions Chapdelaine's prior conviction for cocaine trafficking and an informant's claim that Chapdelaine and Fiore had earlier tried to rob another armored car. There is no indication that any juror saw this article or knew these supposed facts.

indicating that two of the defendants had pleaded guilty before trial. All four of the panel members affirmed that they could be impartial. Neither Chapdelaine nor Whalen challenged any of the four for cause.

There is no basis on this record for any claim of "widespread, highly inflammatory publicity." United States v. Moreno Morales, 815 F.2d 726, 734 (1st cir.), cert. denied, 484 U.S. 966 (1984). The only issue is whether juror knowledge of guilty pleas by co-defendants is information so searing that failure to excuse the juror for cause is plain error, even though the trial judge found the jurors to be impartial. The voir dire did not in this instance reflect a "pattern of deep and bitter prejudice," Irvin v. Dowd, 366 U.S. 717, 726 (1961), compelling

the court to override the juror's claim of impartiality. We do not think juror bias is inherent in the knowledge that a co-defendant has pled. Hines v. United States, 131 F.2d 971, 974 (10th Cir. 1942). Cf. Murphy v. Florida, 421 U.S. 794 (1975) (juror knowledge of defendant's prior convictons).

There is even less basis for Chapdelaine's complaint that some of the seated jurors had relatives in law enforcement or were familiar with some of the trial participants or their families. Chapdelaine was entitled to challege jurors for cause or to argue on appeal that it was plain error not to excuse a juror. But here no specifics are offered in his brief, so there is no error to assess. As for the claim that trial counsel was ineffective in failing to challenge jurors, that issue

is not normally open on direct appeal and must await a collateral attack, if Chapdelaine chooses to make one. See United States v. Arango-Echeberry, 927 F.2d 35, 37 (1st Cir. 1991).

Whalen's Guilty Plea. As the government was completing the presentation of its case, Whalen pled guilty (outside the presense of the jury) and withdrew from the trial. This prompted a motion for mistrial from Chapdelaine, which the district court denied. Chapdelaine's position then, renewed now, was that the jury would conclude from Whalen's absence that he had pled guilty and would draw the further inference that Chapdelaine, as an alleged co-conspirator, must be guilty as well.

We addressed this issue in United States v. Del Carmen Ramirez, 823 F.2d

1 (1st Cir. 1987). The district court in that case, faced with the same situation, declined to declare a mistrial but gave a cautionary instruction to the jury. We approved this approach, stating that the court should "clearly and carefully instruct the jury to consider the evidence against a particular individual, alone, and to determine guilt or innocence on that basis." Id. at 3. In this case, the district court delivered an instruction almost identical to the one we approved in Del Carmen Ramirez:

> Members of the Jury, you'll note that Mr. Whalen is no longer sitting at counsel table and he is no longer a party to this action. You are not, I repeat, you are not to speculate, surmise in any way whatsoever why he is not here. It's none of your concern; it's not part of your

> deliberations; you will not even discuss the matter as we go forward. The case stands here with Mr. Chapdelaine as the defendant. Is anyone going to have a problem with that? If so, speak up now. I can't stress to you the importance of fairness, objectivity, total impartiality and I stress that again and I stress to you why he is not here is none of your concern; it has nothing to do with your deliberations in this case in any way whatsoever.

Chapdelaine now says that the instruction should have been repeated in the closing charge to the jury. At trial, he made no such request and the failure to do so was not plain error.

Sufficiency of the Evidence. Chapdelaine next claims that the evidence at trial was insufficient to prove conspiracy, attempted robbery, various firearms-related offenses, and interstate

transportation of a stolen vehicle. In assessing these claims, reasonable inferences and credibility judgments are taken in the light most favorable to the verdict; and the issue is whether a rational jury could have found the defendant guilty beyond a reasonable doubt. United States v. Bastista-Polanco, 927 F.2d 14, 17 (1st Cir. 1991).

Beginning with conspiracy, Chapdelaine says that the evidence did not prove an intent to commit robbery. This is not a serious argument. The evidence described at the outset of this opinion, a sketch that omits further incriminiating detail, could easily persuade a reasonable jury that Chapdelaine and his associates "cased" the BayBank branch and the armored truck, positioned stolen vehicles for

an escape, acquired weapons and disguises, arrived at the scene ready to commit the crime and were frustrated only by an accidental change in the truck's schedule. United States v. Buffington, 815 F.2d 1292 (9th Cir. 1987), where the Ninth Circuit found the evidence inadequate, involved far less aggravated facts.

This same evidence supported Chapdelaine's conviction for attempted robbery. To prove attempt, the government must establish both an intent to commit the substantive offence and a "substantial step towards its commission," United States v. Figueroa, 976 F.2d 1446, 1459 (1st Cir. 1992), comprising "more than mere perparation" but "less than the last act necessary before the actual commission of the substantive crime." United States v.

Manley, 632 F.2d 978, 987 (2d. Cir. 1980), cert. denied, 449 U.S. 1112 (1981). Chapdelaine argues that the group's actions amounted to no more than mere preparation because the defendants did not leave their vehicles or make a move toward the bank. In Del Carmen Ramirez we found that a group's conduct in "casing the bank, stealing a car, and arriving armed at the bank shortly before the Wells Fargo truck was to arrive" constituted a substantial step toward robbery. 823 F.2d at 2. See also United States v. Johnson, 962 F.2d 1308, 1310-11, 1312 (8th Cir.) (same result under similar facts), cert. denied, 113 S.Ct. 358 (1992). That describes the activity in this case, and we have no reason to reach a different result.[4]

4/ In a related argument, Chapdelaine contends that the jury instruction on

Turning to the firearms-related offenses, Chapdelaine was convicted of using firearms during and in relation to a crime of violence, possession of firearms and ammunition after a felony conviction, and interstate transportation of a firearm with an obliterated serial number. In addition to the guns and ammunition recovered from the green laundry bag, police also seized five rounds of ammunition from Chapdelaine's bedroom closet. The ammunition recovered from the closet formed the basis of a separate count.

Note 4 continued/ what is "a substantial step" was inadequate. The objection was not raised at trial and we are not told what was wrong with the instruction other than that "a more complex and detailed instruction was required." We therefore consider the claim waived. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir.) (issued raised in a perfunctory manner are deemed waived), cert. denied, 494 U.S. 1082 (1990).

Chapedelaine's argument on appeal is two-fold. First, he says that the evidence did not show that he "knowingly" possessed the guns found in the laundry bag because there was no proof that he looked inside the bag. At trial, Chapdelaine testified that he thought the bag contained a tire jack and car tools. Noting that the bag was recovered from Fiore's Plymouth instead of the Wagoneer, Chapdelaine argues that the evidence did not exclude the possibility that, unbeknownst to him, guns were substituted for the jack and tools when the bag was transferred from the Wagoneer to the Plymouth. In this case, involving a carefully planned armed robbery with abundant weapons, we think the jury could reasonably infer that the bag's contents when seized were the same as when Chapdelaine handled the bag hours before,

and that Chapdelaine knew that the bag contained firearms. See United States v. Arango-Echeberry, 927 F.2d at 38.

Second, Chapdelaine argues that the evidence failed to prove his "possession" of the firearms in the laundry bag and the ammunition found in his bedroom closet. Chapdelaine's handling of the laundry bag adequately established his possession of the weapons within.[5] As for the bullets in his closet, Chapdelaine emphasizes that the owners of the house where he rented a room were gun dealers who testified to storing ammunition throughout the home. However, the bullets

5/ As for the question of the guns' use in relation to the crime, the jury could readily have concluded that, by transferring the guns to the Wagoneer before setting off for the mall with the others, Chapdelaine "intended to have [the weapons] available for possible use during or immediately following" a robbery. United States v. Payero, 888 F.2d 928, 929 (1st Cir. 1989).

retrieved from Chapdelaine's closet were in an area within his "dominion and control." Further, they matched those found in the .357 Magnum recovered from the laundry bag. This was enough to prove that Chapdelaine was at least in "constructive possession" of the ammunition in his closet. See United States v. Garcia, Nos. 92-1427, 92-1423, slip op. at 6-11 (1st Cir. Feb. 4, 1993); United States v. Wight, 968 F.2d 1393, 1397-98 (1st Cir. 1992).

Chapdelaine's last attack on the evidence requires little comment. He says that a rational jury could not convict him of knowingly transporting a stolen vehicle across state lines because, as he testified at trial, he did not realize the Wagoneer was stolen. But of course the jury was entitled to disbelieve his testimony, and Chapdelaine

does not otherwise contest the government's proof. That proof included (in addition to that summarized at the outset) evidence that Chapdelaine possessed tools commonly used by car thieves and Chapdelaine's own admission that he used a screwdriver to start the Wagoneer.

The Flaw in the Indictment. Chapdelaine's next claim of error is the most serious: He was mistakenly convicted of an offense for which he was not indicted. The count at issue charged interstate transportation of a stolen firearm, a Colt .45 caliber pistol seized from the green laundry bag. Chapdelaine was in fact initially named in this count in the original indictment handed down by the grand jury. Probably by accident, Chapdelaine's name was omitted from the count in a superseding indictment.

The omission escaped the attention of the prosecutor, Chapdelain's defense counsel, and the trial judge, all of whom proceeded as if Chapdelaine were still charged in the count. At trial, Chapdelaine's counsel and the government stipulated that the Colt was stolen, and there was evidence that he knowingly transported it across state lines. The district court charged the jury on the stolen firearm count and it was included in a redacted indictment given to the jury to reflect only counts naming Chapdelaine. In preparing the pre-sentence report, the probation officer discovered the error. The district court then vacated the conviction on the stolen firearm charge but denied a motion by Chapdelaine for a new trial on all counts.

We are not cited to any precedent

directly addressing this issue.[6] The important fact conveyed to the Jury, Chapdelaine's possession of the weapon, was admissible as "intent" evidence on several other counts, whether or not possession was charged as an offense. The stipulated fact that the gun was stolen may not have been admissible on the other counts, but if so the prejudicial force of this point was very faint, as other evidence showed multiple weapons, two stolen cars, an obliterated serial number and ample planning the evidence as to each count, and its verdict--including the acquittal of

6/ The closest in point is Chow Bing Kew v. United States, 248 F.2d 466 (9th Cir.), Cert. denied, 355 U.S. 889 (1957). The Ninth Circuit there dismissed a conviction on a count in which the defendant wa not named while lieaving intact a conviction on another charge. The question of whether the former conviction invalidated the latter was apparently not raised.

Chapdelaine on two counts relating to the stolen Jaguar--suggest that it did just that.

III. SENTENCE

Chapdelaine's final challenge is to sentencing calculations.[7] First, as to the counts charging interstate transportation of the stolen Wagoneer, he objects to including the value of the stolen Jaguar and to a two-level enhancement in his base offense level for more than minimal planning. These computations were made in the pre-sentence report, without objection by Chapdelaine. Whether or not these computations were

---

7/ Although the 1991 Sentencing Guidelines were in effect at the time of Chapdelaine's sentencing, the district court applied the 1990 guidelines in effect at the time of the offenses, a result more favorable to Chapdelaine. See United States v. Harotunian, 920 F.2d 1040, 1041-42 (1st Cir. 1990). All references in this opinion are to the 1990 guidelines.

error (Chapdelaine was not convicted of the counts relating to the stolen Jaguar), his sentence was not affected by these two calculations. Pursuant to the guidelines, the district court disregarded the stolen car counts and set Chapdelaine's offense level solely on the basis of the grouped robbery counts. U.S.S.G. § 3D1.4(c). It then sentenced Chapdelaine at the low end of the guideline range due to his age. adjustments to the stolen car counts simply did not figure into Chapdelaine's sentence.

Next, Chapdelaine complains of the computation on the robbery counts. The guideline for robbery calls for a four-level increase for losses ranging from $800,000 to $1,500,000. U.S.G. § 2B3.1(b)(6). Where as here an attempt or conspiracy is at issue, "intended"

loss is the test.[8] At sentencing, over Chapdelaine's objection, the court imposed a four-level increase in his base offense level for a "loss" of $1,000,000--the approximate amount of money contained in the Wells Fargo truck when it stopped at the BayBank on the day Chapdelaine and the others were arrested.

Chapdelaine contends that the loss in this case was speculative because no robbery actually occurred. However, "[i]n an attempted theft, the value of the items that the defendant attempted to steal would be considered." U.S.S.G. § 2X1.1,

---

8/ U.S.S.G. § 2B3.1, application note 3, cross-references section 2B1.1 for "valuation of loss" in robbery offenses. Section 2B1.1, application note 2, refers the judge to section 2X1.1 in cases of "partially completed conduct." Section 2X1.1 sets the base offense level as that fixed for the object offense (in this case, robbery), "plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty." U.S.S.G § 2X1.1(a).

application note 2. The requirement in section 2X1.1(a) of "reasonable certainty" "goes to what with reasonable certainty can be determined to be the conspirator's intent." United States v. Medeiros, 897 F.2d 13, 18 (1st Cir. 1990).

Finally, Chapdelaine invokes section 2X1.1(b), which directs the sentencing court to decrease by three levels the offense level for an attempt or conspracy unless the defendant or conspirators were "about to complete" the underlying offense "but for the apprehension or interruption by some similar event beyond [the defendant's or conspirators'] control." U.S.S.G. §§ 2X1.1(b)(1), (2). The district court in this case declined to grant the reduction because it found that the robbery was frustrated "simply because the . . . truck arrived earlier than usual." On appeal, Chapdelaine disputes

the correctness of this finding while the government naturally urges us to uphold the district court.

We affirm the district court's conclusion that on the present facts Chapdelaine was not entitled to the reduction. The evidence showed that Chapdelaine and the others arrived at the mall prepared and equipped to carry out a robbery and were thwarted only by the unexpected early departure of the Wells Fargo truck. Under these circumstances, there was no clear error in the district court's conclusion that Chapdelaine was "about to complete" a robbery "but for apprehension or interruption by some similar event beyond the defendant's control." U.S.S.G. § 2X1.1(b)(1). See United States v. Johnson, 962 F.2d at 1313-14 (upholding denial of the reduction under similar

facts).

Chapdelaine argues that the reference in section 2X1.1(b) to an interruption "similar" to apprehension excludes offenses that are prevented by fortuitous events like the premature departure of the Wells Fargo truck. In our view, the guideline reflects a policy decision that conspiracies and attempts should be treated like substantive offenses for sentencing purposes if the substantive offense was nearly completed, and the defendant did not voluntarily withdraw. The Sentencing Commission likely believed that near accomplishment of the criminal object normally poses enough risk of actual harm, and reveals enough culpability, as to justify the same punishment that would be imposed for a completed offense. It is nearness of the crime to achievement--not the precise

nature of the involuntary interruption--that defeats the reduction available for conspiracies and attempts that have not progressed very far. This one progressed far enough.

The judgment of conviction and sentence are affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-1358

UNITED STATES,
Appellee,

v.

GEORGE CHAPDELAINE,
Defendant-Appellant.

BEFORE

BREYER, Chief Judge,
TORRUELLA, SELYA, CYR, BOUDIN AND STAHL,
Circuit Judges

ORDER OF COURT

Entered: May 4, 1993

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a

rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

FRANCIS P. SCIGLIANO

CLERK

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private porperty be taken for public use, without just compensation.

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.